Heard Feb 3 3 1-557 Judge Davy 1 Allen instead of — 7 —

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 137.

Liability of Distrct Reversed Hunt to write

CHARLES D. MAXWELL, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Stanton

FILED JANUARY 22, 1874.

64. Dec. 19 —

1 Black

Mayhew and Ely of Maryland

Dillon Ex 789

ANNA'S ARCHIVE

SUPREME COURT OF THE UNITED STATES.

No. 137.

CHARLES D. MAXWELL, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Writ of error-bond	2	1
Writ of error	3	2
Return of justices	4	2
Declaration	4	2
Summons	8	3
Marshal's return	10	4
Pleas	10	4
Joinder of issue	11	4
Note of issue	12	4
Proceedings in circuit	12	5
First bill of exceptions	17	6
Plaintiff's first prayer	29	9
Plaintiff's second prayer	31	10
Defendant's second prayer	32	10
Defendant's third prayer	32	10
Defendant's fourth prayer	33	10
Defendant's fifth prayer	34	10
Defendant's seventh prayer	34	10
Second bill of exceptions	36	11
Third bill of exceptions	38	11
Fourth bill of exceptions	39	12
Fifth bill of exceptions	40	12
Sixth bill of exceptions	42	12
Motion for new trial on exceptions	43	13
Proceedings in general term	44	13
Clerk's certificate	45	14

1 In the supreme court of the District of Columbia, the 18th day of November, A. D. 1873.

CHARLES D. MAXWELL
vs.
DISTRICT OF COLUMBIA. } At law. No. 9449. In error.

Know all men by these presents, that we, Chas. D. Maxwell, Wm. H. Minnix, Wm. Hemphill Jones, are bound unto the above-named District of Columbia in the sum of two hundred dollars, to be paid to the said District of Columbia or its successors; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 18th day of November, A. D. 1873.

Whereas the above-named Charles D. Maxwell hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Charles D. Maxwell shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

CHAS. D. MAXWELL. [SEAL.]
WM. H. MINNIX. [SEAL.]
W. HEMPHILL JONES. [SEAL.]

Sealed and delivered in presence of—

Approved this 19th day of Nov., 1873.

D. K. CARTTER,
Chief-Justice.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Charles D. Maxwell, plaintiff, and the District of Columbia, defendant, No. 9449 at law, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the honorable Nathan Clifford, senior associate justice of the

Supreme Court of the United States, this 19th day of November, in the year of our Lord 1873, and of the Independence of the United States the 98th.

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To the District of Columbia:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Charles D. Maxwell is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, D. K. Cartter, chief-justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Chf. Just.

Service acknowledged.

WILLIAM A. COOK,
Atty. for D. C.

NOV. 29, 1873.

3 (Indorsed:) 9449. At law. Writ of error.

4 The answer of the chief-justice and justices of the supreme court of the District of Columbia, within named.

The record and proceedings whereof mention is within made follow in these words, to wit:

Declaration.—Filed March 13th, 1872.

In the supreme court of the District of Columbia, the thirteenth day of March, A. D. 1872.

CHARLES D. MAXWELL, PLFF.,
v.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9449.

The plaintiff sues the defendant for money due and payable by the defendant to the plaintiff, for that whereas on the date hereinafter mentioned, and for a long time prior thereto, there was, and still is, a
5 certain common and public highway in the city of Washington, in the District of Columbia, called G street north or northwest, which was and is used as such highway by the good citizens of the United States, for passing and repassing on and over the same, on foot as well as otherwise; and whereas said defendant well knowing the premises, was bound to keep said highway in such condition as to render it safe and convenient for passage and transit as aforesaid, on, over, and across the same, yet, nevertheless, the plaintiff alleges that heretofore, to wit, on the first day of March, 1872, the said highway was out of repair and in a dangerous and unsafe condition, by reason of the gross negligence and default of the defendant, of all of which the defendant had notice, yet, nevertheless, to wit, on the day and year last aforesaid, the said defendant, not performing and regarding its duty, as aforesaid, wrongfully and negligently permitted and allowed said public highway or street as aforesaid to be and remain out of repair, and in a
6 dangerous and unsafe condition, unguarded and without fixing or placing, or causing to be fixed or placed, any light or lights, signal or signals, barricades or other warning at or near the deep, dangerous,

and great excavation in said street, between Nineteenth and Twentieth streets west, in said city and District, to denote or show that the same was so there, as aforesaid, and made no effort to secure the same against accidents, or to warn persons passing along said public or common highway or street, of the existance of said excavation or deep pit, by means of and in consequence of which gross negligence and failure of defendant to perform its duty in that respect aforesaid, the plaintiff then and there, to wit, on the day and year aforesaid, in the night-time, while walking moderately and carefully along and across said street or highway, along the north side thereof, and between the streets aforesaid, stepped down, slipped, and fell into a deep pit, excavation, hole, or trench, which was then and there and for a long time had been in the street afore-
7 said, between the streets aforesaid, left open, unguarded, and unprotected in any manner whatsoever as aforesaid, through the gross negligence and default of the defendant, whereby the bone or bones of the plaintiff's right leg, near the ankle, became and were dislocated, sprained, and bruised, the ligaments ruptured and torn and otherwise injured, whereby the plaintiff's ankle-joint was rendered weak and unsound, and the plaintiff unable to use said leg and ankle-joint without great pain and weakness therein, and so by means of said injury the plaintiff became and was sick, lame, and disordered for a long space of time, during which he suffered and still suffers great pain, and was and is hindered from attending to his necessary and lawful business, and was and is deprived of divers gains and profits, and was obliged to expend divers sums of money, to wit, one thousand dollars, in and about endeavoring to be healed and cured of said dislocation, bruises, and injuries, as aforesaid, and is per-
8 manently incapacitated and rendered unable to walk with ease and comfort as he did prior to said dislocation and injuries aforesaid, and unable to transact and attend to his lawful business, and is also seriously and permanently injured in his bodily health and strength, to the great damage of the plantiff in the sum of twenty thousand dollars, and therefore he brings his suit.

F. P. B. SANDS,
JAMES HOBAN,
Attorneys for Plaintiffs.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof, otherwise judgment.

F. P. B. SANDS,
JAMES HOBAN,
Attorneys for Plaintiff.

Summons.—Issued March 13, 1872.

9 In the supreme court of the District of Columbia, the 13th day of March, A. D. 1872.

CHARLES D. MAXWELL, PLAINTIFF,
v.
THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9449.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term occurring twenty days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief-justice.

[SEAL OF COURT.] R. J. MEIGS, *Clerk.*

SANDS.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

10 (On back:)

Served copies of the declaration, notice to plead, and this summons on the defendant, W. A. Cook, atty. for Dist. of Col., the 13 day of March, 1872.

A. SHARP,
Marshal of D. C.

Service accepted, March 13, 1872.

WILLIAM A. COOK,
Atty. D. C.

Plea.—Filed April 2d, 1872.

In the supreme court of the District of Columbia, this second day of April, 1872.

CHARLES D. MAXWELL
v.
THE DISTRICT OF COLUMBIA. } At law. No. 9449.

1st. The defendant says that it is not guilty as alleged.

2d. And for a further plea the defendant says that it was not

11 entrusted with the care of the street at the point where the accident declared upon occurred, at the time it is alleged to have occurred.

WILLIAM A. COOK.
Atty. for Deft.

Joinder of issue.—Filed April 4, 1872.

In the supreme court of the District of Columbia.

CHARLES D. MAXWELL
v.
THE DISTRICT OF COLUMBIA. } At law. No. 9449.

The plaintiff joines issue upon the defendant's first plea.
The plaintiff joines issue upon the defendant's second plea.

F. P. B. SANDS,
JAMES HOBAN,
Attys. for Plaintiff.

12 *Note of issue.—Filed April 8th*, 1872.

In the supreme court of the District of Columbia, the 8th day of April, 1872.

CHARLES D. MAXWELL, PLAINTIFF,
v.
DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9449.

Last pleading filed April 4th, 1872.

WILLIAM A. COOK,
Attorney for Defendant.

F. P. B. SANDS,
JAMES HOBAN,
Attorneys for Plaintiff.

To the CLERK.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing on the fourth Monday, 27th day of January, A. D. 1873.

13 MONDAY, *January 27th*, 1873.

By order of Chief-Justice Cartter, presiding, the court is opened by proclamation of the marshal, pursuant to the rule of court.

THURSDAY, *April 3d*, 1873.

Session resumed pursuant to adjournment. Chief-Justice Cartter presiding.

CHARLES D. MAXWELL, PLFF.,
v.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9449. Cal. 105.

And now comes here as well the plaintiff, by his attorney, Mr. Sands, as the defendant, by its attorney, Mr. Cook, and a jury of good and lawful men of this District, to wit, Michael Duffey, Asa L. Hazleton, William A. Fenwick, William H. Parker, James R. Harrover, Henry D. Gunnell, John Van Riswick, James M. Terrell, Robert A. Griffin, George Neitzey, George Becker, and Robert Toleaferro, who, being
14 sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

FRIDAY, *April* 4, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

CHARLES D. MAXWELL, PLFF.,
v.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9449. Cal. 105.

And now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow.

SATURDAY, *April 5th*, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

CHARLES D. MAXWELL, PLFF.,
v.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9449. Cal. 105.

15 And now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find the issue aforesaid in favor of the defendant. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defence, taxed at $, and have execution thereof.

Motion for a new trial.—Filed April 8, 1873.

In the supreme court of the District of Columbia, this 8th day of April, A. D. 1873.

CHARLES D. MAXWELL
v.
THE DISTRICT OF COLUMBIA. } At law. 9449.

16 Now comes the plaintiff, by his counsel, and prays that the verdict rendered in the above-entitled case may be set aside, and a new trial granted, and states, as his grounds for this motion, the following reasons: 1st. Because the verdict is contrary to the evidence. 2d. For errors of law by the justice presiding in his instructions to the jury. 3d. Because of the discovery of a new and material evidence unknown to the plaintiff at the time of trial.

SATURDAY, *April* 26, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

CHARLES D. MAXWELL, PLFF.,
v.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9449.

And now again come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon the plaintiff's motion for a new trial is overruled.

17 Whereupon the plaintiff files his six bills of exception to the rulings of the court on the trial of this case, duly signed and sealed by the court, and prays that they may be made a part of the record, which is done accordingly.

Plaintiff's bills of exception.

FIRST BILL.

In the supreme court of the District of Columbia, the 5th day of April, 1873.

CHARLES D. MAXWELL, PLAINTIFF,
v.
THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9449.

The plaintiff on the trial of this cause, to maintain on his behalf the issue joined, introduced evidence tending to prove that he was a retired surgeon in the United States Navy, (holding the rank of medical director, under the act of March 3d, 1871,) under orders to attend

18 to all officers of the United States Navy in the city not provided with other medical attendance, residing on the north side of F street north, between Twenty-first and Twenty-second streets west, in Washington City, District of Columbia; that at the time of the alleged injury to him, in the declaration in this cause mentioned, he was engaged on active duty in said Navy in attending professionally to his patients; that on the night of the first of March, A. D. 1872, he went

to the residence of Professor Coffin, of the said Navy, situate on the south side of G street north, near to and east of Twenty-first street west, and then and there paid a professional visit; that he left said residence on said night about half past nine o'clock to make a professional visit at the residence of James Eveleth, situated on the west side of Nineteenth street west, between G and H streets north, intending to go thence, by way of H street north and Pennsylvania avenue and
19 Fifteenth street west and F street north, to the Ebbitt House, situated on F street north, east of Fourteenth street west; that on leaving the residence of said Coffin he was by him told to look out for the street; and thereupon, the night being very dark, and the carriage-way of said G street being excavated and torn up east of Twenty-first street, he crossed over to the sidewalk on the north side of said G street, which was, and for a long time before had been, left open to, and was used by, the residents along that street, and by others, more or less, and which he believed to be at the time in better condition than the south side, it being the only way of egress and ingress to and from the houses of residents on that street, having been left in passable condition prior to that date, and he having in perfect safety passed over said sidewalk three or four days before said date, and that he knew well that the carriage-ways in F and G streets, and in 19th and 20th streets, intersecting
20 those streets, were excavated to a depth of about three or four feet below the level of the sidewalks, and that steps were cut in the banks on either side of the intersecting streets, to enable foot-passengers to get from sidewalk to sidewalk, planks being laid in the excavated road-bed for their convenience in going across the street; that he proceeded along said sidewalk eastward, crossing the excavated carriage-way at Twentieth street in safety, and mounted to the sidewalk at the northeast corner of G and Twentieth streets; that he then deliberated as to the safest course to the residence of said Eveleth, and that knowing that H street between Nineteenth and Twentieth streets was in a bad condition, he proceeded towards Nineteenth street west, still keeping for safety in the middle of the brick pavement on the north side of said G street, which was, as aforesaid, left open to and used by the residents along said street, and that whilst walking carefully
21 and moderately along said paved sidewalk, and before he reached the corner of Nineteenth and G street, he slipped and fell, without any fault on his part, into a deep and dangerous excavation cut across said sidewalk, of the existence of which he had no knowledge, causing a partial dislocation of his ankle and rupturing the ligaments around the same, from which he suffered greatly, and sustained serious and permenant injury; that there never had been, and that at the time of said accident there was not, any barrier, barricade, guard, or light at or near said excavation, nor any suitable precaution taken by the District of Columbia to render travel on said sidewalk, whilst so left open for the use of the said residents as above stated, or to warn those passing over it of the existing danger. That the nearest lights on G street to said excavation were those at the intersection of G street with Eighteenth and Twenty-first streets, and that said excavation
22 was made under the direction of the board of public works of the District of Columbia, at the request of Brevet Brig. Genl. Wm. Myers, depot quartermaster, for the convenience of the Government teams, said request being made on the 23d January, 1872—the board of public works directing the superintendant of the streets, S. C. Wroe, under date of 31 Jannary, 1872, to direct the contractor engaged in grading G street to have the carriage-way leading to the quartermaster's

stables sloped as requested, which was done, the said contractor doing his work under a contract made with the board of public works, dated 3 January, 1872; and further, that the excavation was of a dangerous character by the evidence of three or four of the witnesses in the cause who testified to falling into the excavation that same evening after dark; and that said excavation was from 2 to 2½ feet in depth at the point where the plaintiff fell in, from actual measurement by witnesses
23 living near the spot, made shortly after the accident, and according to the testimony of all those witnesses who fell into it, and that the first light near the spot was put up several days after the accident. And here the plaintiff rested.

And thereupon the defendant, to maintain on its behalf the issue joined, introduced evidence tending to prove that at the hour of ten minutes past six o'clock p. m., on the first of March, 1872, a light was placed against a tree at the entrance of said excavation, and that the said sidewalk on the north side of G street, though open as above stated, was not in good condition, and that the carriage-way in that locality was all more or less torn up and excavated.

And the defendant further offered evidence tending to prove that, whilst the carriage-ways of G street and the intersecting streets,
24 19th and 20th, were dug up and excavated, the sidewalks on the north side of G street were by the authorities of the District left open for the use of the residents as aforesaid, and were used both night and day by the residents along said street during the time the improvements were going on, and that to facilitate the passing from one sidewalk to the other on the north side of G street at its intersection with 20th street, steps were cut in the banks at the corners where the carriage-ways were excavated.

That no barriers or barricades had ever been placed across the said sidewalk anywhere to notify those passing over it that it was in anywise dangerous.

That this condition of things was well known to the superintendent of the streets in that locality, who directed the excavation to be made in accordance with the instructions given him by the board of public works, but that he took no precautions to guard the same, nor
25 did he notify the plaintiff of the existence of this excavation into which he, the plaintiff, fell and was injured.

The defendant gave evidence tending to show that the improvements on G street between 19th and 20th were made with care and caution; that O. E. Little, the superintendent of the Evans Concrete Paving Company, had given orders to protect every hole and excavation as the work progressed, and that this was done; that shortly before the accident he went to New York, and on his return, about three days after the accident, found the work guarded, and also a light or lamp near the place of accident; that one of the employees was specially detailed for this purpose, named Patrick Welsh; that by actual measurement made immediately after the accident of which the plaintiff complains, the depth of the excavation was from seven (7) to twelve (12) inches; that
26 the slope was gradual from the cut in the street into the Quartermaster-General's grounds; that a light was suspended on a tree alongside of the excavation, as well as at other points on the east and west end of the square or line of the street between Nineteenth (19) and Twentieth, (20,) and the street, except the sidewalk, blockaded during every night, both before and after the night of the alleged accident; that the pavement was better on the south than on the north side; that in cutting down the carriage-way, part of the line of the old

pavement was left standing about three feet above the cut for the accommodation of persons having houses alongside of it, and for this purpose substantial steps had been cut leading up to this line of pavement at each end; that the superintendent on the part of the board of public works took special care to prevent accidents and to inform persons of the condition of the locality; that
27 the work was carried on openly, and the condition of the street and line of the pavement visible and notorious to all persons residing in the locality or passing along it; that the plaintiff resided in the vicinity and was familiar with the ground; that there were other safe and convenient lines of travel which the plaintiff might have taken without danger in going to the point of his destination; that G street was not in a suitable condition to be travelled; that the gas-mains and water-mains were laid bare, and were in many places standing upright; that Gen'l Myers sent for Samuel Wroe, superintendent of the board of public works, about the time he sent his letter to Mr. Shepherd, and desired him to keep the entrance to the grounds of the Department in good order, and that it was after this from time to time that the slope was gradually made to correspond with the
28 cutting on the street as it progressed; that the work commenced in the fall of 1871, and was intermitted during the winter, and was renewed in the early spring of 1872, and was authorised by law.

The plaintiff also gave in evidence to the jury by his own testimony tending to show that he resided on F street between 21 & 22 streets, near the scene of the alleged accident, at and for a long time before the same, and that he was well acquainted with all the streets in that vicinity, and with the condition of G street, between 19 and 20th, where the accident occurred, and with the condition of the sidewalk at that place, and that the street and sidewalk at that place were torn up much as if an earthquake had gone through that section; that while the improvements in said section were going on, he often passed over the sidewalk on north side of G between 19 & 20 sts., and had passed over it only a few days before the time of the accident; that he did not remem-
29 ber whether lights were exhibited there before the accident; that the plaintiff did immediately after the accident go to the Ebbitt House, taking his carriage for that purpose, a distance of more than six squares from the place of the accident, and return from thence to his home on F street. That the night when the accident occurred was very dark, and that the plaintiff mounted up steps in order to get upon the sidewalk on the north side of G street, between 19th and 20th streets.

That the plaintiff was promoted after the accident, and that no diminution or reduction of his pay was made or occurred after the accident.

Whereupon the plaintiff, by his counsel, prayed the court to grant the following two several prayers of instruction to the jury:

30 First. If the jury believe from all the evidence in the cause that the sidewalk on the north side of G street north, between 19th and 20th streets west, in Washington City, D. C., was on the 1st of March, 1872, and for a long time before had been, open to and used by the public as a highway or thoroughfare, and that under the direction or authority of the defendant a dangerous excavation was made across said sidewalk such as made it necessary and proper that barriers or lights should be placed, or other suitable measures taken to warn those passing along said sidewalk of the existing danger, and that such precautionary measures were not at that date adopted for the protection of the public, and if they believe that the plaintiff, Dr. Charles D. Maxwell,

whilst in the discharge of his professional duties, and passing carefully and moderately along said sidewalk on the night of that day, fell, without any fault on his part, into the said excavation and was injured,
31 they shall find for the plaintiff.

Second. If the jury believe from the evidence that on the 1st of March, 1872, there was on the north side of G street north, between 19th and 20th streets west, an excavation across the sidewalk, such as would make it necessary and proper that lights, barriers, or barricades should be placed so as to warn those passing along said sidewalk of the existence of said excavation, then it was the duty of the defendant to have caused such precautionary measures to be taken for the protection of the public; and if the jury further find that on said date no barricades, barriers, or lights were placed or other measures taken so as to prevent injuries to those passing along said sidewalk, and that the plaintiff whilst passing carefully and moderately along said sidewalk on the
32 night of the 1st of March, 1872, fell, without any fault on his part, into said excavation and was injured, they shall find for the plaintiff.

Whereupon the defendant, by its counsel, prayed the court to grant (among others) the following five several prayers of instruction to the jury:

Second. The burden of proof is on the plaintiff, and, in order to recover, he must, by the proof, not only satisfy the jury that he was injured in the manner, or at the time, asserted or claimed by him; but, also, that the injury received was exclusively the result of negligence on the part of the District.

Third. If by 20th street or any other in the vicinity of his house, or the line of his travel, the plaintiff knew that he could have gone to the point or points of his destination in safety and without encoun-
33 tering dangers in the way from cuts or excavations, or other obstacles, and, with a knowledge of the work or improvements then going on on G street, between 19th and 20th, and of its general condition, he voluntarily chose it as his line of travel, and, while passing along it, slipped or fell into the cut or excavation leading into the Quartermaster's Department or stables, and was thus injured, he cannot recover.

Fourth. While the authorities of the District are engaged, by contract or otherwise, in improving the streets or cutting them down to alter or reduce the grade, they are bound to use only reasonable care to prevent accidents to reasonably careful people, and if a traveller, knowing the dangerous condition of the streets, ventures to pass over them, he does so at his own risk, and if he receives any injury in so passing
34 over them, he is without remedy against the District.

Fifth. The improvements of G street were authorized and done under sanction of law, and if the jury, from the evidence, believe that on or about the first of March, 1872, the street was cut down and unfinished, and the sidewalks torn up in part or in whole, and that these facts were known to the plaintiff, or were visible and notorious to persons familiar with the neighbourhood, and that the plaintiff was so familiar, it was negligence on his part to venture on the street or sidewalks during the night-time without providing himself with a light or proper safeguard or means of preventing accident, and he cannot recover provided the jury believe, from the evidence, that a reasonably careful person would not have ventured to pass over the said street or sidewalk without a light or other means of preventing accidents.

35 Seventh. If the jury believe from the evidence that the agents

and officers of the defendant used reasonable care and prudence in erecting barricades and exhibiting lights to prevent accidents, and that such lights were removed, taken down, or extinguished by the weather, by accident, or by the wrongful act of third persons, then the defendant is not liable for injuries resulting through the removal or extinguishment of said lights, unless express notice was given to said defendants of such removal or extinguishment a sufficient time beforehand to enable the defendant to restore the lights; or unless its removal, if it existed, lasted for a sufficient length of time to justify the presumption that the defendant knew of its removal in time to restore it, the plaintiff cannot recover.

36 But the court refused to grant said first and second several prayers of plaintiff, or either of them, as prayed by plaintiff; but granted each of said prayers with the qualification contained in and subject to the second prayer of defendant. To which refusal to grant the said prayers, and each of them, as they were presented, and to which granting of the said prayers and each of them as qualified by and subject to the second prayer of defendant, the plaintiff then and there, and before the jury had retired, excepted, and prays the court, now for then, to sign and seal and enroll this his first bill of exception, which is accordingly done this fifth day of April, A. D. 1873.

D. K. CARTTER, [SEAL.]
Chief-Justice.

SECOND BILL.

And after the evidence on behalf of the plaintiff and of the defendant had been given to the jury, and after the said plaintiff
37 and defendant had prayed the court to grant the several prayers of instruction to the jury by said plaintiff and by said defendant respectively prayed, each in their own behalf, (as in said first bill of exception hereinbefore fully set forth and hereby referred to as part hereof,) the court refused to grant said first and second several prayers of plaintiff or either of them as prayed by plaintiff, but granted each of said prayers with the qualification contained in and subject to the said third prayer of defendant; to which refusal to grant the said prayers, and each of them, as they were presented, and to which granting of the said prayers and each of them with the qualification contained in and subject to the third prayer of defendant, the plaintiff then and there, and before the jury had retired, excepted, and prayes the court, now for then, to sign and seal and enroll this his second bill of exceptions,
38 which is accordingly done this fifth day of April, A. D. 1873.

D. K. CARTTER, [SEAL.]
Chief-Justice.

THIRD BILL.

And after the evidence on behalf of the plaintiff and of the defendant had been given to the jury, and after the said plaintiff and defendant had prayed the court to grant the several prayers of instruction to the jury, by said plaintiff and by said defendant respectively prayed, each in their own behalf, (as in said first bill of exception hereinbefore fully set forth, and hereby referred to as part hereof,) the court refused to grant said first and second several prayers of plaintiffs, or either of them, as prayed by plaintiff, but granted each of said prayers with the qualification contained in and subject to the fourth prayer of defendant;

to which refusal to grant the said prayers and each of them
9 as they were presented, and to which granting of the said prayers and each of them with the qualification contained in and subject to the fourth prayer of defendant, the plaintiff, then and there, and before the jury had retired, excepted, and prays the court, now for then, to sign and seal and enroll this his third bill of exception, which is accordingly done this fifth day of April, A. D. 1873.

D. K. CARTTER, [SEAL.]
Chief-Justice.

FOURTH BILL.

And after the evidence on behalf of the plaintiff and of the defendant had been given to the jury, and after the said plaintiff and defendant had prayed the court to grant the several prayers of instruction to the jury by said plaintiff and by said defendant respectively prayed, each in their own behalf, (as in said first bill of exception herein-
40 before fully set forth, and hereby referred to as part hereof,) the court refused to grant said first and second several prayers of plaintiff, or either of them, as prayed by plaintiff, but granted each of said prayers with the qualification contained in and subject to the fifth prayer of defendant; to which refusal to grant the said prayers and each of them, as they were presented, and to which granting of the said prayers and each of them with the qualification contained in and subject to the fifth prayer of defendant, the plaintiff then and there, and before the jury had retired, excepted, and prays the court, now for then, to sign and seal and enroll this his fourth bill of exception, which is accordingly done this fifth day of April, A. D. 1873.

D. K. CARTTER, [SEAL.]
Chief-Justice.

FIFTH BILL.

And after the evidence on behalf of the plaintiff and of the defendant had been given to the jury, and after the said plaintiff and
41 defendant had prayed the court to grant the several prayers of instruction to the jury by said plaintiff and by said defendant respectively prayed, each in their own behalf, (as in said first bill of exception hereinbefore fully set forth and hereby referred to as part hereof,) the court refused to grant said first and second several prayers of plaintiff, or either of them, as prayed by plaintiff, but granted each of said prayers with the qualification contained in and subject to the seventh prayer of defendant; to which refusal to grant the said prayers and each of them, as they were presented, and to which granting of the said prayers, and each of them, with the qualification contained in and subject to the seventh prayer of defendant, the plaintiff then and there, and before the jury had retired, excepted, and prays the court, now for then, to sign and seal and enroll this his fifth bill of exception,
42 which is accordingly done this fifth day of April, A. D. 1873.

D. K. CARTTER, [SEAL.]
Chief-Justice.

SIXTH BILL.

And after the evidence on behalf of the plaintiff and of the defendant had been given to the jury, and after the said plaintiff and defendant had prayed the court to grant the several prayers of instruction to

the jury by said plaintiff and by said defendant respectively prayed, each in their own behalf, (as in said first bill of exception hereinbefore fully set forth and hereby referred to as part hereof,) the court granted the said second, third, fourth, fifth, and seventh several prayers of the defendant hereinbefore fully set forth as qualified by plaintiff's said two several prayers of instruction to the jury, to which granting of said several prayers and each of them as qualified, the plaintiff then
43 and there, and before the jury had retired, severally excepted, and prays the court, now for then, to sign and seal and enroll this his sixth bill of exception, which is accordingly done this fifth day of April, A. D. 1873.

D. K. CARTTER, [SEAL.]
Chief-Justice.

Motion for a new trial on exceptions.—Filed in general term Sept. 23, 1873.

In the supreme court of the District of Columbia, holding a general term, this twenty-third day of September, A. D. 1873.

CHARLES D. MAXWELL
v.
DISTRICT OF COLUMBIA. } At law. No. 9449.

And now comes the plaintiff by his attorneys, and moves the court for a new trial upon exceptions filed.

F. P. B. SANDS & JAMES HOBAN,
Attorneys for Plaintiff.

44 Proceedings before the supreme court of the District of Columbia, in general term, commencing the fourth Monday (22d day) of September, A. D. 1873.

Present Chief-Justice Cartter, and Justices Olin, Wylie, and Humphreys.

MONDAY, *September* 22, 1873.

By order of the court the session is opened by proclamation of the marshal.

MONDAY, *November* 10, 1873.

Session resumed pursuant to adjournment. Present Chief-Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur.

CHARLES D. MAXWELL, PLAINTIFF,
v.
THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9449.

And now again come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it seems to the
45 court here that there is no error in the record or proceedings of the circuit court, or in its judgment, therefore it is considered that the said judgment be, and the same is, in all things affirmed, and that the defendant recover against the plaintiff the costs of the proceedings in this court, to be taxed by the clerk.

Office of the clerk of the supreme court of the District of Columbia, ss:

JANUARY 3RD, 1874.

I certify that the foregoing is truly copied from originals on file and of record in this office, which originals together constitute the record and proceedings of the said supreme court of the District of Columbia in the case mentioned in the writ of error to which this certificate is annexed.

Witness my hand and the seal of said court the day and year aforesaid.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 137. Charles D. Maxwell, plaintiff in error, vs. The District of Columbia. District of Columbia, sup.-ct. Filed 22 January, 1874.

Supreme Court United States.

CHARLES D. MAXWELL,
PLAINTIFF IN ERROR,
vs.
THE DISTRICT OF COLUMBIA. } No. 137.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief of Plaintiff in Error.

F. P. B. SANDS,
JAMES HOBAN,
Counsel for Plaintiff in Error.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

CHARLES D. MAXWELL, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA.
No. 137.

BRIEF OF PLAINTIFF IN ERROR.

This is a writ of error to the Supreme Court of the District of Columbia.

The plaintiff in error sought to recover damages from the District of Columbia for injuries received by him from falling into an unguarded excavation across the sidewalk on the north side of G street, between 19th and 20th streets west, in the City of Washington, District of Columbia. On the trial of the cause the plaintiff proved that whilst the Board of Public Works of the District of Columbia, under the authority conferred by the act of the District Legislature approved July 10th, 1871, were engaged in improving G street northwest by reducing its grade, (see marginal page 28 of printed record,) the carriageway from curb to curb had, on the 1st March, 1872, been excavated to a great depth; that during the progress of this work the sidewalks on said street were purposely left open for public use, and that, to facilitate reaching the sidewalks, those in charge of the street caused steps to be placed at the intersection of the streets for the convenience of those who passed and repassed along the same. (See marginal pages of record, 20–24–26.)

That on the evening of the 1st of March, 1872, the plain-

tiff, a surgeon in the United States Navy, on active duty, whilst in the discharge of his professional duties, left his home on F street, near 21st street west, and passed along the north side of G street to the sidewalk between 19th and 20th streets; that having a patient to visit on 19th street above G, (marginal page 18,) he proceeded (as he had before that date done, and as he then believed he could do in perfect safety) along the northern sidewalk of the street, (marginal page 19;) that when near 19th street he fell into a deep excavation, of which he had no knowledge, and which had been cut directly across the sidewalk, and (although the night was very dark) had been left without barriers, guards, or lights of any description to prevent accidents to those passing along the sidewalk, and that he was grievously injured by so falling. (Marginal pages 20, 21, 22, and 24 of record.)

It was further proved that the excavation was made under orders given by officers of the District to the Superintendent of Streets, who was in charge of the improvements going on at that point. (Pages 22–27 of record.)

On behalf of the respective parties the court was prayed to grant certain instructions to the jury, which are set forth in the record, (pp. 9, 10, and 11,) and exceptions were taken by the plaintiff to the refusal to grant the prayers presented in his behalf and to the granting of the prayers submitted on the part of the defendant, as in the record set forth. The verdict was for the defendant.

First Assignment of Error.

It was error to grant the instruction as to the burden of proof which is contained in the following prayer of the defendant:

Second. The burden of proof is on the plaintiff, and, in order to recover, he must by the proof not only satisfy the jury that he was injured in the manner or at the time asserted or claimed by him, but *also* that the injury received was exclusively the result of negligence on the part of the District. (See page 10 of record.)

1st Point. Contributory negligence is a matter of defense, the burden of proving which is on the defendant.

Hill, adm'r., *v.* New Haven, 37 Vermont Rep., 507.
Johnson *v.* The Hudson River Railroad, 20 N. Y. Rep., 70.
Railroad Company *v.* Gladmon, 15 Wallace, 401.
Sherman and Redfield on Negligence, §§ 27–31, and cases cited.
Wharton on Negl. § 423, and cases cited

Where a defect in the highway has been conceded or proved, it is sufficient for the plaintiff to establish a *prima facie* case that he has sustained an injury by reason of such defect; and when the court in substance instructs the jury that the plaintiff is bound to establish as a distinct affirmative proposition that he was guilty of *no* negligence on the occasion, it is manifest error.

2d Point. It was error to instruct the jury that the plaintiff must prove that the injury was exclusively the result of negligence on the part of the defendant, for it is clear that had proof been offered that the injury was caused by the *joint* negligence of the defendant and a stranger, it would have been no defense.

Webster *v.* Hudson River R. R., 38 N. Y. Rep., 260.
Shear & Redf. on Negl. §§ 27.28.

SECOND ASSIGNMENT OF ERROR.

It was error for the court to grant the instruction contained in the defendant's third prayer, to wit:

Third. If, by F or Twentieth streets, or any other in the vicinity of his house or the line of his travel, the plaintiff knew that he could have gone to the point or points of his destination in safety and without encountering dangers in the way from cuts or excavations or other obstacles, and with a knowledge of the work or improvements then going on on G street, between Nineteenth and Twentieth, and of its general condition, he voluntarily chose it as his line of travel, and while passing along it slipped or fell into the cut or excavation leading into the Quartermaster's Department or stables, and was thus injured, he cannot recover. (Page 10 Record.)

1st Point. Where it is conceded or proved that a street or sidewalk, dedicated to the public use, has been kept open by the corporate authorities, the presumption is, that the street or sidewalk is *safe* and *secure;* and if, relying upon this presumption, and having a reasonable assurance of safety, the plaintiff, exercising ordinary care, in passing over the street or sidewalk, is injured, by reason of a defect therein of which he had no knowledge, it is error to instruct the jury, as in this prayer, that the plaintiff cannot recover if he knew of *other* streets by which he might have reached his destination in safety.

The Railroad *v.* Hanning, 15 Wallace, 649.
Erie City *v.* Schwingle, 22 Penn., 385.
Davenport *v.* Ruckman, 37 New York Rep., 568.
Renwick *v.* New York Central R. R., 36 N. Y. Rep., 133.
Bacon *v.* Boston, 3 Cushing, 174.
The Mayor, &c., *v.* Sheffield, 4 Wallace, 189–191.
Grant *v.* City of Brooklyn, 41 Barbour, 381.
Snow *v.* Housatonic R. R., 8 Allen, 450.
Sher. & Redfield on Negligence, § 385. 400-413
Wharton on Negl. § 337- and cases cited.

2d Point. The error in the latter portion of this instruction is patent, since the jury are instructed that the plaintiff cannot recover, *even* although his "general knowledge of the condition of the street" gave him a reasonable assurance of safety in passing over a sidewalk, which it was conceded had been left open for the public to use, he being ignorant of the *particular* excavation into which he fell and was injured. (See marginal page 21 of record.)

Humphries *v.* Armstrong, 56 Penn., 204, and cases above cited.
Shear & Redf. on Negl. § 414.

3d Point. The instruction complained of takes from the jury the determination of the question of negligence, wherein there is error.

See authorities cited on page 6 of this brief.
Wilson vs Smith 10 Maryland 75.

THIRD ASSIGNMENT OF ERROR.

It was error to grant the instruction contained in the defendant's fourth prayer, to wit:

"Fourth. While the authorities of the District are engaged, by contract or otherwise, in improving the streets or cutting them down to alter or reduce the grade, they are bound to use only reasonable care to prevent accidents to reasonably careful people; and if the traveler, knowing the dangerous condition of the streets, ventures to pass over them, he does so at his own risk, and if he receives an injury in so passing over them, he is without remedy against the District." (See p. 10, record.)

1st Point. The duty of the authorities of the District while engaged in improving streets or cutting them down to alter or reduce the grade, is incorrectly stated in the instruction, that duty being to *secure* to the *extent* of the means under their control the *safety* of the traveler, and to see that the working and grading of the streets should be so performed that no person should be injured through the omissions of duty or want of care in its operatives in performing the work.

Milwaukee *v.* Davis, 6 Wisconsin, 385.
Storrs *v.* Utica. 17 N. Y. Rep., 104–106.
Buffalo *v.* Halloway, 7 N. Y. Rep., 449.
Chicago *v.* Robbins, 2 Black, ~~418~~ 418
Chicago *v.* Robbins, 4 Wallace, 657.
Grant *v.* Brooklyn, 47 Barbour, 381.
Sher. & Red. on Negligence, §§ 147, 369, 376, 400.
Wharton on Negl. § 992

2d Point. It is the right of the traveler to use that portion of the street *which is set apart* for the public whilst such improvements are going on, with every assurance of safety, and is held to the use of only ordinary care in so doing.

Humphries *v.* Armstrong, 56 Penn., 204.
Milwaukee *v.* Davis, 6 Wisc., 391.
Smith *v.* Lowell, 6 Allen, 39.
Renwick *v.* N. Y. Central R. R., 36 N. Y., 133.
Reed *v.* Northfield, 13 Pick., 94.

3d Point. It is a further error that this prayer takes from the consideration of the jury not only the circumstances attending the plaintiff's being at that place on the night in question, his business, and the facts which governed him in his selection of the route whilst attending his patients, but also the very question of negligence.

Hill, Adm'r of Eager *v.* Town of New Haven, 37 Ver., 501.

THE FOURTH ASSIGNMENT OF ERROR.

It was error to grant the instruction contained in the defendant's fifth prayer upon the question of negligence, to wit:

"Fifth. The improvements of G street were authorized and done under the sanction of law, and if the jury, from the evidence, believe that, on or about the 1st of March, 1872, the street was cut down and unfinished and the sidewalk torn up in part or in whole, and that these facts were known to the plaintiff or were visible and notorious to persons familiar with the neighborhood, and that the plaintiff was so familiar with it, it was negligence on his part to venture on the street or sidewalks during the night-time without providing himself with a light or proper safeguard or means of preventing accident, and he cannot recover: provided the jury believe from the evidence that a reasonably careful person would not have ventured to pass over the said street or sidewalk without a light or other means of preventing accidents." (p. 10 of the record.)

1st Point. The question of negligence is one of fact, and wholly and solely for the jury, in determining which they are to consider all the facts attending the plaintiff's presence at the place of the accident, at the time thereof, and the circumstances under which he acted; and it is error in this instruction that the consideration of these facts which rightly go to affect this question of negligence are studiously taken from the jury, as is the question of negligence itself.

Hubbard *v.* Conard, 35 N. Hamp., 52.
Swift *v.* Newbury, 36 Ver., 355.

Perkins *v.* Fond du Lac, Wisc.
Hill, Adm'r, *v.* New Haven, cited above.
City of St. Paul *v.* Kuby, 8 Minn., 154.
Boland *v.* Mo. R. R. Co., 36 Mo. Rep., 491.
Lovengruth *v.* City of Bloomington, Illinois Rep.

2d Point. Further error is to be found in that this instruction imposes upon the plaintiff a duty which plainly and indisputably belongs to the defendant, the authorities being uniform to the effect that the party *creating* the danger is bound to *avert* it by *special* precautions.

See cases from Milwaukee, Boston, Utica, Brooklyn, and Buffalo, cited above.

3d Point. The traveller's right to use a public street continues until he is notified by lights, barriers, or barricades that there is a danger which prevents its further use.

See cases above cited.
Reed *v.* Northfield, 13 Pick., 94.
Smith *v.* Lowell, 6 Allen, 39.

4th Point - the prayer assumes as a fact proof - wherein there is Error -

THE FIFTH ASSIGNMENT OF ERRO

It was error to grant the instruction contained ... ... fendant's seventh prayer, to wit:

Seventh. If the jury believe from the evidence that the agents and officers of the defendant used reasonable care and prudence in erecting barricades and exhibiting lights to prevent accidents, and that such lights were removed, taken down, or extinguished by the weather, by accident, or by the wrongful act of third persons, then the defendant is not liable for injuries resulting through the removal or extinguishment of said lights, unless express notice was given to said defendant of such removal or extinguishment a sufficient time beforehand to enable the defendant to restore the lights, or unless its removal, if it existed, lasted for a sufficient length of time to justify the presumption that the defendant knew of its removal in time to restore it, the plaintiff cannot recover—

There being nothing in the evidence in the case upon which to base this prayer, which is fatal error.

Keech *v.* Baltimore and Washington R. R., 17 Md. Rep., 32.

Munroe *v.* Woodruff, 17 Md. Rep., 159.

R. R. *v.* Gladmon, 15 Wall., 401. 409

SIXTH ASSIGNMENT OF ERROR.

The refusal to grant the first prayer presented on behalf of plaintiff, as follows:

First. If the jury believe from all the evidence in the cause that the sidewalk on the north side of G street north, between Nineteenth and Twentieth streets west, in Washington city, District of Columbia, was, on the 1st of March, 1872, and for a long time before had been, open to and used by the public as a highway or thoroughfare, and that under the direction or authority of the defendants a dangerous excavation was made across said sidewalk, such as made it necessary and proper that barriers or lights should be placed, or other suitable measures taken, to warn those passing along said sidewalk of the existing danger, and that such precautionary measures were not at that date adopted for the protection of the public; and if they believe that the plaintiff, Dr. Charles D. Maxwell, whilst in the discharge of his professional duties, and passing carefully and moderately along said sidewalk on the night of that day, fell, without any fault on his part, into the said excavation, and was injured, they shall find for the plaintiff. (Page 9 of record.)

1st Point. The instructions prayed for must be given or refused, but cannot be modified, unless, as modified, they give the law.

Conrad *v.* Amador, 3 Cal., 400.

2d Point. The above prayer fully, fairly, and correctly gives the law as to the plaintiff's right to recover upon the facts as therein given, if found by the jury to be proved by the evidence.

The Mayor *v.* Sheffield, 4 Wallace, 189.

Robbins *v.* Chicago, 2 Black, 418.

City of Providence *v.* Clapp, 17 Howard, 161.
Storrs *v.* Utica, 17 N. Y. Rep., 104.
Buffialo *v.* Holloway, 7 N. Y. Rep., 493.
Grant *v.* Brooklyn, 41 Barbour, 381.
Milwaukee *v.* Davis, 6 Wis., 377.
Bacon *v.* Boston, 3 Cushing, 174.
Sherman & Redfield on Negligence, §§ 385–400.

See authorities in Supplementary Brief.

SEVENTH ASSIGNMENT OF ERROR.

The refusal to grant plaintiff's second prayer as presented, to wit:

Second. If the jury believe from the evidence that, on the 1st of March, 1872, there was, on the north side of G street north, between Nineteenth and Twentieth streets west, an excavation across the sidewalk such as would make it necessary and proper that lights, barriers, or barricades should be placed, so as to warn those passing along said sidewalk of the existence of said excavation, then it was the duty of the defendant to have caused such precautionary measures to be taken for the protection of the public; and if the jury further find that on said date no barricades, barriers, or lights were placed, or other measures taken, so as to prevent injuries to those passing along said sidewalk, and that the plaintiff, whilst passing carefully and moderately along said sidewalk, on the night of the 1st of March, 1872, fell, without any fault on his part, into said excavation, and was injured, they shall find for the plaintiff. Page 9, Record.

See points and authorities in last assignment of error.

EIGHTH ASSIGNMENT OF ERROR.

The instructions as granted were calculated to mislead the jury, it being difficult, if not impossible, for the jury to discover what was the instruction the court designed to give; and in this there was error.

Harrison *v.* The Mayor, &c., of Balto., 1 Gill, 264.

F. P. B SANDS,
JAMES HOBAN,
Counsel for Plaintiff in Error.

Supreme Court United States.

CHARLES D. MAXWELL,
PLAINTIFF IN ERROR,
vs.
THE DISTRICT OF COLUMBIA.

No. 137.

Supplementary Brief on the Question of Liability of Defendant.

F. P. B. SANDS,
JAMES HOBAN,
For Plaintiff in Error.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

CHARLES D. MAXWELL, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA.
No. 137.

SUPPLEMENTARY BRIEF ON THE QUESTION OF LIABILITY OF THE DEFENDANT.

By the evidence submitted at the trial and set forth in the record, it was proved and conceded that the excavation, into which the plaintiff fell and was injured, was made under the instructions of the Board of Public Works of the District of Columbia, and under the immediate supervision of the Superintendent of Streets, who took no precautionary measures whatever to warn the plaintiff of its existence. (Marginal p. 24 of record.)

It was proved and conceded that the work on the streets at that point was being done under a contract given out by said Board of Public Works, whose employees superintended its prosecution; that the grading of that street was done under the authority expressly conferred on the Board of Public Works by an act of the Legislative Assembly, passed July 10, 1871, entitled "An act making appropriations for improvements," and by an act passed August 19, 1871, authorizing the Board of Public Works to fix certain grades.

The Act of Congress Considered.

It will be seen from the organic act that the defendant is "a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this title," its corporate existence and powers being co-extensive with the territorial limits of the District. (Act of Feb. 21, 1871, sec. 1.)

Thus was created a government by the name of the District of Columbia, which is "the successor of the corporations of Washington and Georgetown," (Sec. 41 same act,) the ordinances of which are continued in force until repealed or modified by Congress or the Legislative Assembly. (Sec. 40 same act, and see secs. 8 and 9 of act of Corportion of Washington of June 3, 1853.)

Municipal corporations can only act through officers and agents duly appointed and authorized to carry out the purposes for which the body corporate was created.

In this country the charter or constitution of the corporation usually provides with care as to all the *principal officers,* such as mayor, aldermen, and the like, and prescribes their various duties. (§ 146, Dillon on Municipal Corporations.)

And we see that the various principal officers of the new body corporate, such as Governor, Secretary, Delegate, Legislative Assembly, Boards of Health and Public Works, and the manner of their appointment as well as their several powers and duties, are provided for in the act of Congress of February 21st, 1871. (See particularly secs. 2, 4, 5, 26, 31, 34, 37, and 38 of said act.)

It declares that "the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United

States and the provisions of this act." (Sec. 18 of act of 21 February, 1871.

The opening of new streets and alleys, making provision for the erection and maintenance of lights, the laying of water mains and sewers, and other improvements in the streets, avenues, and alleys, of benefit to the public, were most certainly such rightful subjects of legislation, (see Van Ness *v.* City of Washington, 4 Peters, 281,) which in fact demanded and received the attention of the legislative body in due time as occasion required, as shown by the many acts of the Legislative Assembly passed for these particular municipal purposes.

Was the exercise of *this* right of legislation consistent with the provisions of the act?

We find provision made in this act for the appointment of a Board of Public Works in the District, with powers and duties defined as follows:

"The Board of Public Works shall have entire control of and *make all regulations* which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and *all other works* which may be intrusted to their charge by the Legislative Assembly or Congress." (See sec. 37, act of Feb. 21, 1871.)

There is no power therein given to open, or to grade, or to light streets or alleys, but simply they are given entire control of the streets, &c., and the *making of regulations for* keeping them in repair.

The repairing of the streets, the keeping them in condition, such as would ensure the safety and convenience and comfort of the public using them was a corporate duty, and Congress merely provided here for the appointment of those officers who were to be intrusted with the disposition of the means which the corporate body, through its legislative branch, should by taxation provide *for the purpose.*

Without the appropriation of means for the purpose the Board of Public Works could do nothing even toward the

mere repairing of the streets, *so* placed under their control, and are not, consequently, an independent body.

That this power and duty of opening of streets and alley, and of providing for the actual repairing of them, vested properly with the Legislative Assembly we see from this very section 37, which, after designating the specific and very simple duty and authority therein defined as belonging to the Board of Public Works, permits their authority to embrace "*all other works* which may be intrusted to their charge by the Legislative Assembly or Congress."

The Action of the Legislative Assembly.

What do we see as the consequence of this reserved authority in the Legislative Assembly?

Scarcely has the new corporate body fairly entered upon its career when we find upon its statute-books acts providing, not merely for *repairing*, but for *improving* the streets of the city of Washington; acts providing for assessments upon the property of the citizens to raise the necessary means for carrying out these improvements, which could not have been made without the previous exercise of legislative authority over the work to be done.

We find, first, the act of July 10, 1871, commonly called the Four Million Loan Bill, which provides as follows: "That the sum of four millions of dollars is hereby appropriated, until the expiration of the first fiscal quarter after the adjournment of the next regular session of the Legislative Assembly, for the *improvement* and *repairs* of the streets, avenues, alleys, and roads in the District of Columbia, and for the *construction* and *repairs* of *sewers*, bridges, and other *public works* therein, to be *used* and expended *according to the provisions* of the act of the Congress of the United States entitled 'An act to provide a government for the District of Columbia,' approved February 21, 1871, and *as fully* as may be *practicable* and *consistent* with the public interest, *in conformity* with the *plan of improvement submitted* to said Legislature by the Board of Public Works of said District in its communication bearing date June 20, 1871." (Sec. 1.)

Herein we see that this Board of Public Works submitted for the consideration of the Legislative Assembly plans and estimates for a general improvement of the streets of the city of Washington, which by this act are approved; a loan sufficient to cover the estimated cost is provided for, and the work entrusted to the Board of Public Works is directed to be carried out according to the plans submitted.

It was proved and conceded at the trial that the grading of G street northwest was one of the improvements expressly mentioned in the plan submitted.

This act of the Legislature was ratified by act of Congress of May 8, 1872. (Sec. 6.)

We further find, by another act of the Legislative Assembly approved August 19, 1871, and offered in evidence at the trial, "That the Board of Public Works be, and they are hereby, authorized to fix and establish the grades of the avenues, streets, and alleys of the cities of Washington and Georgetown and the roads of the county of Washington."

And by other acts, approved August 18, 1871, under the authority given in the organic act, the Legislature further entrusts the Board of Public Works with the erection and maintenance of lights and the laying of water-mains and sewers in the streets, avenues, and alleys throughout the city.

Conclusions.

The Board of Public Works are thus shown to be in terms or by necessary implication municipal officers, whose duty concerns the municipality alone. They have no fund, and no power to create a fund. They can do nothing respecting the streets or avenues without obtaining the sanction of the defendant, through its Legislative Assembly, and an appropriation of the means necessary for the performance of the work. They act under the directions of the defendant, and make, but only by its authority, contracts binding upon it. They report to it, expend its appropriations, use its officers, and direct and perform such work as may be imposed upon them by the defendant in respect to the local or municipal affairs of the municipal government *as such*. They are

therefore, by adoption at least, the officers and agents of or a branch of the government of the District of Columbia, and their acts of omission and commission, within the sphere of their authority, become the acts of the defendant.

It was under the authority conferred by the acts we have cited above that the Board of Public Works, under date of January 3, 1872, gave out a contract for reducing the grade of and improving G street northwest; and the work thereunder was in progress when the excavation which caused the injury to the plaintiff was made. (Orig. rec., p. 28.)

These legislative enactments, and the subsequent acts of the ministerial officers of the District government, form an unbroken chain, binding the body corporate to responsibility for negligence, on the part of its only recognized and duly authorized agents, in the prosecution of all works of improvement on the streets.

AUTHORITIES.

If there is nothing in the statute showing a contrary intention in the legislature, the true rule of construction is that the legislature intended that the corporation's liability should, to the extent of its corporate funds, be co-extensive with that imposed by the general law on individuals doing the same things.

Sherman & Redfield on Negligence, § 124.

The prosecution of a work authorized by the corporation is ministerial in its character, and the corporation must see that it is done in a safe and skillful manner. This is a corporate and a ministerial duty, not discretionary, but mandatory, absolute, and perfect.

The Rochester White Lead Co. *v.* Rochester, 3 Comst., 466.
Currier *v.* Lowell, 16 Pick., 170.
Weightman *v.* City of Washington, 1 Black, 39.
City of Lowell *v.* R. R. Co., 23 Pick., 24.
Lloyd *v.* The Mayor of New York, 5 N. Y., 369.
Chicago *v.* Robbins, 2 Black, 418.
Hutson *v.* The Mayor, 9 N. Y., 163.

Storrs *v* Utica, 17 N. Y., 105.
Mayor *v.* Sheffield, 4 Wall., 189, 191.
Davenport *v.* Ruchman, 37 N. Y., 573.
City of Providence *v.* Clapp, 17 How., 161.
Dillon on Municipal Corporations, §§ 791, 794, 795, 796.

When a corporation, within the scope of its corporate power, authorizes work to be done, the officers intrusted with the execution of the work become its agents, so as to render it liable to individuals for injuries received by reason of negligence on the part of the officers in the performance of the work.

Dillon on Municipal Corporations, §§ 765, 766–779, note 6.
The Mayor *v.* Bailey, 2 Denio, 444.
Thayer *v.* City of Boston, 19 Pick., 511–15.
Sherman & Redfield on Negl., §§ 155–173.

Power of Congress to create the Government of the District of Columbia.

Congress, under its exclusive power of legislation over the District of Columbia, has the selection of whatever means it may deem essential to the beneficial exercise of that power, and the creation of a body corporate with municipal powers for its government is manifestly a proper exercise of its reserved right of exclusive legislation over the District.

Loughborough *v.* Blake, 5 Wheat., 317.
McCulloch *v* State of Maryland, 4 Wheat., 316.

We maintain, therefore, that, whether we look to the act of Congress alone for the determination of this question, or consider its provisions in the light of the many authorities cited in support of our view, the liability of the defendant in the case before the court is conclusively established.

F. P. B. Sands,
James Hoban,
For Plaintiff in Error.

United States Supreme Court.

CHARLES D. MAXWELL,
Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA.

No. 137.

BRIEF FOR DEFENDANT IN ERROR.

EDWIN L. STANTON,
Counsel for District of Columbia.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1875.

CHARLES D. MAXWELL, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA.
No. 137.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The United States own "an unlimited fee" in the streets and avenues of the city of Washington. The words used in the conveyances to the United States of the streets and public squares of that city, are "the very words which by law are required to vest an absolute and unconditional fee simple in the United States. They are the appropriate terms of art, if we may so say, to vest an unlimited use in the Government." (Van Ness *v.* The City of Washington, 4 Peters, 284.)

By section 37 of the act of Congress, approved February 21st, 1871, (16 Stat. at L., 427; section 77, Revised Statutes relating to the District of Columbia,) Congress conferred upon a Board of Public Works, to be appointed by the President and confirmed by the Senate, entire control of the streets, avenues, alleys, and sewers of the city, with power

to make all regulations necessary for keeping the same in repair, together with similar authority as to such other works as might be intrusted to the charge of the board by the Legislative Assembly of the District, or Congress.

In the fall of 1871, the Board of Public Works began certain improvements in the southwestern section of the city, and in the vicinity of G and 19th streets. The work was suspended during the winter of that year, and was renewed in the early spring of 1872. (Record, 9.) It was carried on by contractors by virtue of contracts with the Board, and under the supervision and direction of the Board, and its officers and agents. In March, 1872, the carriage-ways on G, and 19th and 20th streets, which intersect it, were dug up, the curbs considerably lowered on G street, "the gas-mains and water-mains were laid bare, and were in many places standing upright." "The last named street was not in a suitable condition to be traveled." (Record, 8 and 9.) The sidewalks had not been lowered. In the banks which were thus left at the corners where the intersecting carriage-ways had been excavated, steps were cut for the accommodation of persons having houses along the street. (Record, 9.) The work upon the streets in that neighborhood had been "carried on openly, and the condition of the street and line of the pavement was visible and notorious to all persons residing in the locality, for passing along." Plaintiff "was familiar with the ground." "He was well acquainted with all the streets in that vicinity, and with the condition of G street between 19th and 20th, where the accident occurred, and with the condition of the sidewalk at that place, and that the street and sidewalk were torn up, much as if an earthquake had gone through that section." "He often passed over the sidewalk on the north side of G street between 19th and 20th streets, and passed over it only a few days before the time of the accident." (Record, 9.) The work upon the streets was conducted "with care and caution." There had been given "orders to protect every hole and excavation as the work progressed; and this was done." In January, 1872, at the request of the

depot quartermaster of the United States army, and for the convenience of the Government teams, the contractor engaged in grading G street was directed to slope the carriage-way leading to the quartermaster's stables, and "the slope was gradually made to correspond with the cutting on the street as it progressed." (Record, 9.)

This was for the purpose of keeping the entrance to the grounds of the quartermaster's department in good order, (Record, 7–9;) and was on the north side of G street, between 19th and 20th streets. It was the locality of the accident hereinafter mentioned. The sidewalk was in general about three feet above the cut in the street, (Record, 9,) but at the place just referred to the slope was gradual from the cut in the street into the quartermaster's grounds.

According to testimony adduced by the plaintiff, the excavation at this place was from two to two and a half feet in depth; but according to testimony adduced by the defendant, it was from seven to twelve inches. An employee of the contractor was specially detailed to keep "a light or lamp near the place." A light was suspended on a tree alongside of the excavation, as well as at other points on the east and west end of the square or line of street between 19th and 20th streets; and the street, except the sidewalk, was blockaded during every night, both before and after the night of the alleged accident. The plaintiff, a retired surgeon in the United States navy, on the night of March 1st, 1872, went from his own residence in the neighborhood to that of Mr. Coffin, on the south side of G street, near 21st street. About half-past nine o'clock he left the latter residence with the purpose of visiting Mr. Eveleth, residing on the west side of 19th street, between G and H. He intended to go from Mr. Eveleth's residence to the Ebbitt House, on F, east of 14th street. "The night was very dark," and on leaving the residence of Mr. Coffin, he was told by the latter "to look out for the street." (Record, 7–9.) "The pavement was better on the south than on the north side." (Record, 8.) Mr. Coffin, from whose

house the plaintiff was proceeding, resided on the south side of G street.

Plaintiff crossed over to the sidewalk on the north side of said G street, near 21st street, believing at the time the north side to be in better condition than the south side. He proceeded eastward on the north side of the street, (Record, 7,) "and mounted up the steps in order to get upon the sidewalk on the north side of G street, between 19th and 20th streets." (Record, 9.) "There were other safe and convenient lines of travel which the plaintiff might have taken without danger in going to the point of his destination." (Record, 9.) When he reached the slope which had been made from the grounds of the quartermaster's department to the street, the usual light was not then exhibited, and he fell into the excavation. His ankle was partially dislocated and some ligaments around the same ruptured. But immediately after the accident he took a carriage and went to the Ebbitt House, a distance of more than six squares from the place of the accident, and then returned to his home on F street. He received promotion afterwards, and no diminution or reduction of his pay was made or occurred after the accident.

On March 3 the plaintiff sued the District of Columbia for $20,000. The declaration alleges, among other things, that the defendant was bound to keep a certain public highway, called G street, in such condition as to render it safe and convenient for passage and transit, but "had wrongfully and negligently permitted and allowed said public highway or street to be and remain out of repair, and in a dangerous and unsafe condition, unguarded, and without fixing or placing, or causing to be fixed or placed, any light or lights, signals, barricades, or other warnings," at the place of the excavation, and made no effort to secure the same against accident, or to warn persons of the existence of said excavation, by means of, "and in consequence of which gross negligence and failure of defendant to perform its duty in that respect aforesaid," the plaintiff was injured.

Defendant pleaded the general issue and also a special plea that it was not entrusted with the care of the street at the time and place where the accident occurred.

Subject to certain other instructions, hereinafter discussed, the court, at plaintiff's instance, charged the jury,

"First. If the jury believe from all the evidence in the cause that the sidewalk on the north side of G street north, between 19th and 20th streets west, in Washington city, D. C., was on the 1st of March, 1872, and for a long time before had been, open to and used by the public as a highway or thoroughfare, and that under the direction or authority of the defendant a dangerous excavation was made across said sidewalk such as made it necessary and proper that barriers or lights should be placed, or other suitable measures taken to warn those passing along said sidewalk of the existing danger, and that such precautionary measures were not at that date adopted for the protection of the public, and if they believe that the plaintiff, Dr. Charles D. Maxwell, whilst in the discharge of his professional duties, and passing carefully and moderately along said sidewalk on the night of that day, fell, without any fault on his part, into the said excavation and was injured, they shall find for the plaintiff."

"Second. If the jury believe from the evidence that on the 1st of March, 1872, there was on the north side of G street north, between 19th and 20th streets west, an excavation across the sidewalk, such as would make it necessary and proper that lights, barriers, or barricades should be placed so as to warn those passing along said sidewalk of the existence of said excavation, then it was the duty of the defendant to have caused such precautionary measures to be taken for the protection of the public; and if the jury further find that on said date no barricades, barriers, or lights were placed or other measures taken so as to prevent injuries to those passing along said sidewalk, and that the plaintiff whilst passing carefully and moderately along said sidewalk on the night of the 1st of March, 1872, fell, without any fault on his part, into said excavation and

was injured, they shall find for the plaintiff." (Record, 9–10.)

The instructions given at the instance of the defendant were

1. "The burden of proof is on the plaintiff, and, in order to recover, he must, by the proof, not only satisfy the jury that he was injured in the manner, or at the time, asserted or claimed by him; but, also, that the injury received was exclusively the result of negligence on the part of the District." (Defendant's second prayer, Record, 10.)

2. "If by 20th street or any other in the vicinity of his house, or the line of his travel, the plaintiff knew that he could have gone to the point or points of his destination in safety and without encountering dangers in the way from cuts or other excavations, or other obstacles, and, with a knowledge of the work or improvements then going on on G street, between 19th and 20th, and of its general condition, he voluntarily chose it as his line of travel, and, while passing along it, slipped or fell into the cut or excavation leading into the Quartermaster's Department or stables, and was thus injured, he cannot recover." (Defendant's third prayer, Record, 10.)

3. "While the authorities of the District are engaged, by contract or otherwise, in improving the streets or cutting them down to alter or reduce the grade, they are bound to use only reasonable care to prevent accidents to reasonably careful people, and if a traveler, knowing the dangerous condition of the streets, ventures to pass over them, he does so at his own risk, and if he receives any injury in so passing over them, he is without remedy against the District." (Defendant's fourth prayer, Record, 10.)

4. "The improvements on G street were authorized and done under sanction of law, and if the jury, from the evidence, believe that plaintiff knew that the street was cut down and unfinished, and the sidewalks torn up, or if such condition of the highways was visibly notorious to persons

familiar with the neighborhood, and if a reasonably careful person, conscious of the condition of the street or sidewalk in question, would not have ventured to pass over the same without a light or other means of preventing accidents, then it appeared that it was negligence to venture on the street or sidewalk at night without a light or proper safeguard or means of preventing accidents." (Defendant's fifth prayer, Record, 10.)

5. "If the jury believe from the evidence that the agents and officers of the defendant used reasonable care and prudence in erecting barricades and exhibiting lights to prevent accidents, and that such lights were removed, taken down, or extinguished by the weather, by accident, or by the wrongful act of third persons, then the defendant is not liable for injuries resulting through the removal or extinguishment of said lights, unless express notice was given to said defendants of such removal or extinguishment a sufficient time beforehand to enable the defendant to restore the lights; or unless its removal, if it existed, lasted for a sufficient length of time to justify the presumption that the defendant knew of its removal in time to restore it, the plaintiff cannot recover." (Defendant's seventh prayer, Record, 11.)

In substance, the court instructed the jury that if the excavation in question was such as rendered it necessary and proper that suitable measures should be taken to warn travelers along the sidewalk of danger, then it was the duty of the defendant to have caused such measures to have been taken; that if such measures were not, at the time of the accident, adopted, and if the plaintiff, passing carefully and moderately along, fell, without any fault on his part, and was injured, he was entitled to a verdict, (plaintiff's prayers;) but that he was not so entitled if it appeared from plaintiff's proof that the injury was not exclusively the result of negligence on the part of the District, (defendant's second prayer;) that the authorities engaged in improving the streets were bound to use only reason-

able care to prevent accidents to reasonably careful people, and if (such care being exercised by the authorities) a traveler, knowing the streets to be in a dangerous condition, ventures to pass over them, he does so at his own risk, (defendant's fourth prayer;) that if the street in question was so cut down and unfinished, and the sidewalk so torn up that a reasonably careful person, knowing the facts, would not have ventured to pass over the street or sidewalk without a light or other means of preventing accident, and if the plaintiff knew such facts, but made the venture without a light or means of preventing accident, then the plaintiff could not recover, (defendant's fifth prayer;) nor could he recover if the defendant had used reasonable care and prudence in erecting barricades and exhibiting lights to prevent accidents, but such barricades and lights were removed by weather, accident, or wrongful act of third persons, without notice to defendant, and without sufficient time beforehand to enable defendant to restore the same, and without said removal having lasted for a sufficient time to justify the presumption that defendant knew of the removal in time to restore precautionary measures, (defendant's seventh prayer;) nor could he recover if, by 20th street, or any other in the line of his travel, plaintiff knew that he could have gone to his destination in safety, without encountering danger, but with knowledge of the work or improvements in the street in question, and of its general condition, voluntarily chose it as his line of travel. (Defendant's third prayer.)

Upon these facts and under these instructions the jury returned a verdict for defendant.

Points.

I.

The instruction granted at defendant's instance, which is the subject of plaintiff's first assignment of error, (Record, 10,) is in substance that plaintiff cannot recover if it appears from his proof that the injury received was not

caused exclusively by negligence on the part of defendant. By the plaintiff's own testimony he had long resided in the vicinity of the accident; "was well acquainted with all the streets in that vicinity, and with the condition of G street between 19th and 20th, where the accident occurred, and with the condition of the sidewalk at that place, and that the street and sidewalk at that place were torn up much as though an earthquake had gone through that section; that while the improvements in said section were going on he had passed over the street on the north side of G, between 19th and 20th, and had passed over it only a few days before the time of the accident; * * * * that the night when the accident occurred was very dark, and that the plaintiff mounted up the steps in order to get upon the sidewalk on the north side of G street, between 19th and 20th streets;" (Record, 9;) though the pavement was better on the south than on the north side; that on leaving Mr. Coffin's residence he had crossed the street to get on the north side.

This court has held that "a plaintiff may establish the negligence of the defendant, and his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurrent negligence, the defendant must prove them, and thus defeat the action." (Railroad Company *v.* Gladmon, 15 Wall., 407.) But the opinion of the court in that case adds that "generally the proof which shows the defendant's negligence shows also the negligence or the caution of the plaintiff, and the question of the burden of proof is, therefore, not usually presented with prominence." See also Wharton on Negligence, secs. 426, and 427. These views apply to the case at bar. The plaintiff's own testimony showed his negligence or his caution; and the effect of the instruction was that he could not recover unless the jury was satisfied by the proof adduced in his own behalf that the injury resulted exclusively from the negligence of the District. Under the circumstances of the case this was not error. It would have been different had the plaintiff merely established the

negligence of the defendant, and his own injury in consequence thereof, thereby making out his case, and throwing upon the defendant the burden of proving concurrent negligence on the part of the plaintiff. Besides the instruction in question goes no further than those which were granted at the instance of the plaintiff, in both of which it is expressed as a condition of plaintiff's recovery that the jury should be satisfied that, "without any fault on his part," the injury occurred. To the proposition on page 3 of plaintiff's brief, that had proof been offered that the injury was caused by the joint negligence of the defendant and a stranger, it would have been no defense, it is sufficient answer that the supposititious case thus put is not the one at bar. The question presented by the proof, to which alone the instruction relates, is as to concurring negligence on the part of both plaintiff and defendant.

II.

In the instruction granted at the instance of the defendant, which is the subject of plaintiff's second assignment of error, (Record, 10,) the jury were told that the plaintiff could not recover if he knew of the work or improvements then going on upon G street, between 19th and 20th, and of its general condition, and knew that by other streets in the line of his travel he could reach his destination with convenience and in safety, without incurring dangers or obstacles, but nevertheless voluntarily chose to go along G street, between 19th and 20th. This instruction is sustained by Carolus *v.* New York, 6 Bosworth, 15; Wilson *v.* Charlestown, 8 Allen, 137; Horton *v.* Ipswich, 12 Cush., 488; Achtenhagen *v.* Watertown, 18 Wis., 331.

III.

The instructions to which plaintiff's third and fourth assignments of error relate (Record, 10,) are in effect that in public improvements municipal authorities are bound to use only reasonable care to prevent accidents to reason-

ably careful people, and if such care being used, a traveler knowing the dangerous condition of the streets, ventures to pass over them, he does so at his own risk; and that the plaintiff could not recover if he knew the street and sidewalk in question to be in a dangerous condition but did not adopt the preventive means against the occurrence of an accident which, in the judgment of the jury, a reasonably careful person passing over the street would have adopted. The question here is simply the degree of care required from municipal authorities to prevent accidents during the progress of public improvements upon streets. The requisite degree has been clearly defined by this court. When a specified and clearly-defined duty of general interest is enjoined, in consideration of the privileges and immunities conferred by the act of incorporation, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, "they are clearly liable to the public if they *unreasonably* neglect to comply with the requirements of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance."

Weightman *v.* The Corporation of Washington, 1 Black, 50.

The liability of the municipal authorities in such a case to the public and for special injury to an individual arises only when "they *unreasonably* neglect to comply with the requirements of the charter." The same principle is stated in Dillon on Municipal Corp., sec. 790. In Mayor of Lyme Regis *v.* Henley, 2 Cl. and Fin., 331, the rule is laid down that wherever an indictment would lie for non-repair, there an action in the case would lie at the writ of a party sustaining peculiar damage. Of course an indictment would lie only for unreasonable neglect.

Chicago *v.* Robbins, 2 Black, 418, cited in brief for

plaintiff in error, is a different case from Weightman *v.* The Mayor, and from the case at bar. A recovery having been had against the corporation of Chicago for an accident, the corporation sought a remedy over against Robbins, a private party, who, for the purpose of digging an area, had excavated a public sidewalk, and thus caused the accident. "The privilege extended to Robbins was for his benefit alone, and the city derived no advantage from it except incidentally. Robbins impliedly agreed with the city that if he was permitted to dig the area for his own benefit, he would do it in such a manner as to save the public from danger, and the city from harm." This was not a public improvement, but was an encroachment by an individual, for his own individual benefit, upon a street over which the public had a right to free passage. It is right, therefore, in such a case, that there should be exacted greater care and diligence, so as to secure the safety of the public against dangerous encroachments by an individual for his own benefit upon a public street.

IV.

The instruction to which relates plaintiff's fifth assignment of error, (Record, 22,) relieves the defendant from liability for the absence of barricades and lights, if it had carefully and prudently erected and exhibited the same, but they had been removed or extinguished by weather, accident, or wrongful act of third persons, without express notice to the defendant a sufficient time beforehand to enable it to restore them, or if the removal had not lasted a sufficient time to justify the presumption that defendant knew of it in time to restore it. The brief for plaintiff in error, page 8, impliedly concedes the soundness of this instruction in law, but objects to it solely upon the ground that there is nothing in the evidence upon which to base it. But there was evidence that the improvements in question were made with care and caution; that there had been given "orders to protect every hole and excavation as the work progressed, and this was done;" that an employee was

specially detailed for this purpose; "that a light was suspended on a tree alongside of the excavation during every night, both before and after the night of the alleged accident;" that the superintendent "took special care to prevent accidents." (Record, pages 8, 9.) There was therefore sufficient testimony upon which to base this instruction, the soundness of which as a principle of law counsel for plaintiff in error does not deny. See Wharton on Negligence, section 963, and cases cited.

V.

Having been considered separately, it would serve no useful purpose to again discuss these different instructions as limitations upon the prayers allowed at the plaintiff's instance, to which subject the 1st, 2d, 3d, 4th, and 5th bills of exceptions, and the 6th, 7th, and 8th assignments of error relate. The jury were plainly told that the authorities were bound to use proper measures to protect the public from danger at the locality of the accident; and if they were not used, and if the plaintiff was not himself in fault, he could recover; but he could not recover if, by his own testimony, it appeared that his negligence had contributed to the accident, or if the authorities had used reasonable care to prevent accidents. Being so instructed, the jury found against the plaintiff.

VI.

There remains the more important question whether, in any event, the municipality called the District of Columbia is liable for this accident..

The declaration alleges that the defendant "was bound to keep said highway in such condition as to render it safe and convenient for passage and transit." Whether the action in this case is maintainable against the District of Columbia, depends, in the language of this court in Weightman *v.* The Corporation of Washington, 1 Black, 50, upon the terms and condition of its charter. It

must appear that keeping highways in repair is a specified and clearly defined duty enjoined upon the municipality, in consideration of the privileges and immunities which the act of incorporation confers and secures, and that the means to perform the duty are placed at the disposal of the corporation, or are within its control.

1. Under article 1, section 8, clause 17, of the Constitution, Congress has power:

"To exercise exclusive legislation, in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

An act, approved July 6th, 1790, (1 Statute at Large, 130,) accepted a district of territory upon the Potomac, not exceeding ten miles square, for the permanent seat of government for the United States, said district to be surveyed and defined by three commissioners, under the direction of the President. The same enactment authorized the commissioners to purchase or accept such quantity of land as the President should deem proper for the use of the United States. Under this authority, the commissioners selected the whole of the territory embraced within the present limits of the city of Washington as that portion of the district, within the exclusive control of Congress, which they deemed necessary for the use of the United States.

The deed of conveyance from the original proprietors of the soil to the commissioners was made upon the trust that all the lots thereby sold, or such part thereof as might be thought necessary or proper be laid out, together with other lands within the said limits, for a federal city, with such streets, squares, parcels, and lots as the President of the United States for the time being should approve; and after the President had indicated all the streets, squares, parcels, and lots that he should deem proper for the use of

the United States, there was to be a fair and equal division of the remaining lots between the United States and the original proprietors, and the reconveyances from the Government were to be subject to such terms and conditions as might be thought reasonable by the President for the time being for regulating the materials and manner of the buildings and improvements on the lots generally, in the said city, or in particular streets or parts thereof, for common convenience, safety, and order. The land was not simply dedicated by the original proprietors for use for public squares, streets, or avenues, but the absolute fee-simple vested in the United States, so that the Government can at any time close a street or occupy a public square. (Van Ness *v.* Washington, 4 Peters, 232.) By the act of July 16th, 1790, it was provided that the operation of the laws of the State within the district selected for the permanent seat of government should not be affected by its acceptance for that purpose until the time fixed for the removal of the Government, or until Congress should otherwise by law provide. The commissioners appointed pursuant to that act seem to have administered the affairs of the new city of Washington; for, by the act to abolish the Board of Commissioners in the city of Washington and for other purposes, approved May 1st, 1802, (2d Stat. at Large, 175,) it is provided that the affairs of the city of Washington, which had theretofore been under the care and superintendence of said commissioners, shall thereafter be under the direction of a superintendent, appointed by and under the control of the President, and invested with the powers and charged with the duties of the said commissioners under acts of Congress and acts of the General Assembly of Maryland, or under the deeds and deeds of trust from the original proprietors of the lots.

Thus far no liability was imposed on the inhabitants of Washington in respect to the condition of property used by the United States. Such liability, however, was afterwards placed upon them by enactments of a provisional character. It will be seen that the liability was designed

to be of only temporary continuance, and terminated when Congress put the control of the streets, owned in fee-simple by the United States, into the hands of a federal commission.

2. On May 3d, 1802, there was approved an act to incorporate the inhabitants of Washington. (2d Stat. at L., 195.) This enactment constituted the inhabitants of the city a body corporate, by the name of the Mayor and Council of the City of Washington. The mayor was to be appointed annually by the President, and the council to be elected, and to be divided into two chambers, one of seven and the other of five members. By section 7 the corporation was given full power and authority to "keep in repair all necessary streets, avenues, drains, and sewers, and to pass regulations necessary for the preservation of the same, agreeably to the plan of the said city." This act was to be in force only for two years, and to the end of the next session of Congress thereafter.

By an enactment of February 24th, 1804, (2d Stat. at L., 284,) it was continued in force, with no material changes, so far as the present question is concerned, for fifteen years from the end of the following session of Congress.

By an act approved May 4th, 1812, (2d Stat. at L., 721,) entitled "An act further to amend the charter of the city of Washington," it was provided that the corporation of Washington should be composed of the Mayor, Board of Aldermen, and Board of Common Council, the two boards to be elected, and the mayor to be chosen by them in joint session. Section 5, in addition to the powers theretofore granted to the corporation, gave it power to lay taxes on particular wards, parts, or sections of the city for their particular local improvements, and, after providing for objects of a general nature, the taxes raised on the assessable property in each ward were to be expended therein in filling up and repairing the streets, avenues, &c. Section 6 provided that the corporation should have full power and authority, among other things, to lay open streets, avenues, and alleys. The corporation was thereafter to

be called the Mayor, the Board of Aldermen, and Board of Common Council of the City of Washington. An act of February 28th, 1820, (3d Stat. at L., 543,) extended the act of incorporation to March 3d, 1821.

On May 13th, 1820, there was approved an act entitled "An act to incorporate the inhabitants of the city of Washington, and to repeal all acts heretofore passed for that purpose," (3d Stat. at L., 582,) which continued the inhabitants of the city of Washington as a body politic by the name of the Mayor, Board of Aldermen, and Board of Common Council of the city of Washington, and made the mayor, as well as the members of the two boards, elective by the people. It gave to the corporation full power and authority to open and keep in repair streets, avenues, alleys, drains, and sewers, agreeably "to the plan of the city," and it was to continue in force for twenty years, or until Congress should by law determine otherwise. An act of May 17th, 1848, entitled "An act to continue, alter, and amend the charter of the city of Washington," continued the incorporation of the city in force until twenty years from that date, or until Congress should by law determine otherwise. It provided that the corporation should have full power and authority to take up and relay foot-pavements and paved carriage-ways and to keep them in good repair, and to lay and collect taxes for paying the expenses thereof on the property fronting on said footways and carriage-ways. An act of May 5th, 1864, (13 Stat. at L., 68,) provided that the corporation should have full power and authority to lay taxes on particular wards, parts, or sections of the city for their particular local improvements, and to cause curb-stones to be set, the foot and carriage-ways to be graded and paved, and the necessary sewerage and drainage facilities to be introduced, and to cause avenues, streets, or alleys to be suitably repaired; this provision being intended not as repealing, but as auxiliary to the power already possessed by the corporation to make local improvements on the application of the property owners benefited thereby. It also enacted that the corporation

should designate some proper officer thereof, whose duty it should be to see that the provisions of the act were properly executed, and to keep the pavements and sidewalks upon the avenues and streets at all times in suitable and proper repair. This enactment was amended by the act of February 23d, 1865, (13 Stat. at L., 434,) which authorized the corporation, simultaneously with the grading and paving of any avenue, street, or alley, to lay, or cause to be laid, water or gas service-pipes or lateral house-drains, and to pay all cost thereof.

Thus, prior to February 21st, 1871, the corporation of the city of Washington had, under congressional enactments, full power and authority to open and keep in repair streets, avenues, alleys, drains, and sewers, agreeably to the plan of the city; to lay taxes upon particular wards, parts, or sections of the city for their particular local improvements; to cause the foot and carriage-ways to be set and paved; to introduce necessary sewerage and drainage facilities; to cause avenues, streets, alleys, to be suitably paved or repaired; to lay and collect the taxes upon the property bordering upon each street or alley that might be so paved or sewered; to lay or cause to be laid water or gas service-pipes or lateral house-drains simultaneously with the grading or paving of any avenue, street, or alley in which a main water pipe or main gas pipe, or main sewer pipe might have been laid.

The temporary character of these various acts above cited for the government of the District, by which Congress exercised its power of exclusive legislation over the territory selected for the seat of Government, cannot escape observation. Many of the acts specifically provide the time for which they were to continue in force; many of them were designed for a brief period; and all of them contemplated future change.

3. On February 21st, 1871, was approved "An act to provide a government for the District of Columbia," (16 Stat. at L. 419.) Section 1 constitutes that part of the territory of the United States included within the limits of the Dis-

trict of Columbia a body corporate for municipal purposes, by the name of the District of Columbia, with the usual powers of a municipality not inconsistent with the Constitution and laws of the United States, and the provisions of said act. Section 40 repeals the charters of the cities of Washington and Georgetown on June 1st, 1871, and at that date abolished all the offices of said corporations, with the limitation, however, that the charters should continue in existence for the collection of sums due to them and the enforcement of contracts made by them, and of just claims against them. Section 41 declares the new municipality to be the successor of the old ones, and to be invested with the property thereof. Section 2 vests executive power and authority in a Governor, and authorizes him to grant pardon for certain offenses and to commission officers. Section 3 gives him the veto power under certain restrictions. Section 4 provides for a secretary to record the proceedings of the legislature and the governor in his executive department. Sections 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 29, 30, 33, relate to the composition of the Legislative Assembly and extent of its authority and the mode of transacting its business; and particularly by section 18 the power of the Legislative Assembly is restricted not only by the Constitution but by the provisions of the act itself. Section 25 enacts that the courts of the District shall remain as organized at the time of the passage of the act, until abolished or changed by act of Congress, but the Legislative Assembly is given power to confer additional jurisdiction upon them. Section 26 provides for a Board of Health, to be appointed by the President and confirmed by the Senate, and prescribes its duties. Section 27 provides that the office and duty of Register of Wills, established by act of Congress of February 27th, 1801; Register of Deeds, established by act of February 14th, 1863; United States Attorney, provided for by act of February 27th, 1801, and United States Marshal, (see same act,) shall remain as under existing laws until modified by act of Congress; but power is given to the Legislative

Assembly to impose additional duties upon said officers respectively. Sections 31, 32 and 38 relate to oaths of office, and to salaries and their mode of payment. Section 34 provides for a Delegate to the House of Representatives. Section 35 provides that the Secretary of the Treasury may prescribe the security to be given in respect to the disbursement of moneys by such of the said officers appointed by the President and confirmed by the Senate, pursuant to the act, who by virtue of any provision of law are required to give security. Section 36 provides for a valuation of real estate in the District. Section 39 relates to elections. Section 37 creates a Board of Public Works, to consist of the Governor and four persons to be appointed by the President and confirmed by the Senate. It provides for the mode in which they shall disburse moneys appropriated by the United States or District of Columbia, or collected from property holders, and in which they shall make contracts. It enacts that the Board of Public Works shall have entire control of, and make all regulations which they shall deem necessary for, keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be intrusted to their charge by the Legislative Assembly, or Congress.

(1) Thus the act relates not merely to the municipality created under the name of the District of Columbia, but also to the duties of other officers, judicial as well as executive, not branches of the municipality, but exercising independent authority under the laws of the United States, including the Supreme Court of the District, which, in addition to other jurisdiction, possesses that of a District and Circuit Court of the United States, and including, also, the United States attorney and the United States marshal. The municipality was entrusted with no control whatever over the streets and avenues of the city. Entire control was given to a Board of Public Works, a federal commission which was also authorized to make all regulations which it might deem necessary for keeping them in repair. The Governor, possessing the executive authority of the municipality, was

only *ex officio* a member of this board, and his associates, as well as himself, are appointed by the President and confirmed by the Senate. The secretary of the municipality had no power to record the proceedings of the board, but only of the Legislative Assembly and of the Governor "in his executive department." The power of the board was independent of the Legislative Assembly. It was contemplated by the act that it should disburse appropriations made by the Congress of the United States as well as those which the Legislative Assembly might see fit to make. Congress did appropriate several millions of dollars to be disbursed by the Board, or to pay its expenditures. The duty of making such appropriations was not enjoined upon the legislature. If additional work might be entrusted to the Board of Public Works by the Legislative Assembly, so also might additional duties be given by it to the United States attorney, United States marshal, and the Supreme Court of the District. Apart from such additional duties as might be so imposed by the assembly, the board had its powers as distinctly prescribed by act of Congress as did the other offices just named, and it was as independent of the assembly in respect of the authority committed to it by Congress.

(2) The United States possesses, untrammeled by any fetters, a fee simple title to the streets and avenues of the city, and it was not unreasonable that the control of them should be placed in the hands of United States officers independent of a municipality having ordinary governmental functions for the protection of the persons and property of its inhabitants. Similar legislation had thirteen years earlier occurred with respect to reservations belonging to the United States, and obstructions in the streets and avenues. By section 7 of the act of Congress of June 12th, 1858, (11 Stat. at Large, 326,) it was made the duty of the Commissioner of Public Buildings to cause obstructions of every kind to be removed from streets, avenues, and sidewalks in the city, improved in whole or in part by the United States, and to institute legal proceedings for that

purpose when necessary. Although by section 37 of the act of February 21, 1871, the Board of Public Works had authority to assess upon property adjoining and benefited by improvements authorized by law, and made by that Board, a reasonable proportion of the cost of the improvement, yet, by an act of March 3, 1873, (17 Stat. at Large, 519; section 152, Revised Statutes relating to the District,) Congress enacted that the Secretary of the Interior shall assess and collect the cost of all the improvements made in front of all private property adjoining streets about the Capitol. By law, the Architect of the Capitol has had charge of the improvements upon such streets. These enactments show that, in other laws than that of February 21, 1871, Congress has given control of streets to United States officers, and withheld it from the municipal authorities of the District.

(3) That to the Board of Public Works this entire control of the streets and avenues, with power to make all regulations which it should deem necessary for keeping the same in repair, was committed, not as to a department or subordinate agency of the municipality called the District of Columbia, but as to a federal commission, is shown also by other congressional legislation. Its members were to be appointed by the President and confirmed by the Senate. Section 36 of the Revised Statutes relating to the District, enacts that no person shall draw a salary as a member of said Board "*who shall hold any other federal office*, or who is paid a salary for the discharge of the duties of *any other federal office under the Government of the United States.*"

This enactment is derived from the acts of May 8th, 1872, section 1, (17 Stat. at L., 74,) and of March 3d, 1873, section 1, (17 Stat. at L., 499, 500.) An act of Congress, approved June 20th, 1874, (18 Stat. at L., part 3, page 116,) abolishes Governor, Secretary, Legislative Assembly, and Board of Public Works and Delegate in Congress in the District of Columbia. It distinguishes, in sections 2 and 6, between the accounting officers, other officials, laborers, employees, and the indebtedness of the District, and the

accounting officers, other officials, laborers, employees, and indebtedness of the Board of Public Works. Another act, approved June 23d, 1874, (18 Stat. at L., part 3, page 220,) makes the same distinction between the District of Columbia and the Board of Public Works.

(4) The conclusion is thus reached, that, by the act of February 21st, 1871, a federal commission was given entire control of the streets and avenues, (the property of the United States,) with exclusive power to make regulations which that commission might deem necessary for keeping the same in repair. The Legislature might, if it saw fit, make appropriations for the improvements or repair of the streets. Such duty was not enjoined upon it. Liability on the part of the municipal corporation for neglect or omission of an absolute corporate duty springs from the particular nature of the duty enjoined, which must relate to the local or special interests of the municipality, and be imperative, and not discretionary or judicial, and from the means given for its performance, which must be ample. (Weightman *v.* The Corporation of Washington, 1 Black, 40; Dillon on Municipal Corporations, sec. 765.) In the case at bar the duty was not enjoined, nor were the means given. In the absence of an express statute imposing the duty of keeping the streets in a safe condition, and declaring the liability for injury resulting from the neglect to perform this duty, the burden (if it exists) must appear, upon a fair view of the charter or statutes, to rest upon the municipal corporation as such, and not upon it as an agency of the State, nor upon its officers as independent public officers. (Dillon on Municipal Corporations, sec. 789.) Child *v.* Boston, 4 Allen, 41; Walcott *v.* Swamscott, 7 Allen, 101; Martin *v.* Mayor of Brooklyn, 1 Hill, 550.

(5) The case of Mayor of New York *v.* Bailey, 2 Denio, 444; S. C., 3 Hill, 531, is much relied upon by counsel for plaintiff in error.

In that case, the city of New York being the owner of a dam constructed upon land the title to which was in the city, and

of works built to supply the city with water, was, upon great consideration, and with considerable difficulty, held liable (though the dam was constructed at the instance and expense of the State, by water commissioners appointed by the State, and not by the city authorities,) in an action for injuries sustained by third parties, in consequence of the dam, which was unskillfully built, being carried away by a freshet. The Supreme Court reached this decision by holding that the city, voluntarily accepting the benefits of the act and by instructing the commissioners to proceed with the execution of the work, constituted them its agents; and therefore the principle of *respondeat superior* was applied. In the court of errors, Chancellor Walworth, with some hesitation, assented to the confirmation of the judgment of the court below, but upon a different theory. He held that, the dam being the property of the city, the corporation was legally bound to see that its corporate property was not so used by any one as to injure occupiers on the river below. But none of these conditions of liability exist in the case at bar. The street was not owned by the municipality; nor was the Board of Public Works constituted an agent of the municipality to make the excavation where the accident happened; nor was that excavation made at the instance or by the procurement of the municipality. It was made upon the request presented by the depot quartermaster to the Board of Public Works, for the convenience of United States business. It does not appear in the record, nor is it true, in point of fact, that the work which was in progress on the street in question was carried on in conformity with any enactment of the Legislative Assembly. The "plan of comprehensive improvement," referred to by the brief of counsel, is not part of the record, and it is not conceded that the work was executed conformably to such a plan. Neither the principle upon which the Supreme Court, nor the principle upon which the court of errors decided against the municipality, in the case of the mayor of New York *v.* Bailey, renders the District of Columbia liable in the case at bar.

(6.) Here are also wanting the conditions which were prescribed by the House of Lords, in Mayor of Lyme Regis *v.* Henley, (2 Cl. and Fin., 331,) and by this court in Weightman *v.* The Corporation of Washington, (1 Black, 40,) as being necessary to render a municipal corporation liable for neglect to keep a highway in repair. The duty was not enjoined upon the District of Columbia by the act of February 21st, 1871, nor were the means of performance placed at its disposal. Congress withheld from the municipality the control of the streets. The United States, owning an untrammeled fee simple in them, placed their control in the hands of a federal commission. It results that an action like the present one cannot be maintained, even by a party free from the imputation of that negligence which the jury by their verdict upon the issues presented to them, found in the conduct of the present plaintiff in error. Therefore, whether the rulings of the court below on other questions were right or not, since the action cannot be maintained, the judgment in favor of defendant should be affirmed.

EDWIN L. STANTON,
Counsel for District of Columbia.

16. Wallaw 6 —

4 Peters
Ohio Bank 2 —
Bellows —.

6. Wheaton —
~~[illegible]~~ —
— 447 —

12. Wheaton.
W S & Dandridge
176.